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Supreme Court of the United States

OCTOBER TERM, 1949

No. 157

CIVIL AERONAUTICS BOARD,
Petitioner,

vs.

STATE AIRLINES, INC.,
Respondent.

No. 159

PIEDMONT AVIATION, INC.,
Petitioner,

vs.

STATE AIRLINES, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FILED BY CIVIL AERONAUTICS BOARD AND PIEDMONT AVIATION, INC.

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BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI FILED BY CIVIL AERONAUTICS BOARD AND PIEDMONT AVIATION, INC.

For a fair counter-statement of the case, we respectfully refer this Court to the statement contained in State's cross-petition for writ of certiorari (No. 158, October Term, 1949) at pages 3-10.

I

OPPOSITION TO BOARD'S PETITION

The Bases for the Board's Petition are Unsupportable

The petition for writ of certiorari filed by the Board[1] seems to be based upon three fundamental misconceptions relating to

[1]Petitioner, Civil Aeronautics Board, is hereinafter referred to as the "Board"; petitioner, Piedmont Aviation, Inc., is hereinafter referred to

(1) the scope and extent of the application on which Piedmont proceeded before the Civil Aeronautics Board; (2) the discretion entrusted to the Board by Congress; (3) the scope of the decision below.[1]

(1) The Board misconceives the extent of Piedmont's application.

The extent of Piedmont's application is not subject to debate. It applied for basically north and south routes extending from points principally in North and South Carolina to other points, also east of the Appalachian Mountains, with terminal points at Washington, D. C. and Norfolk, Virginia (App. 69-70). The map incorporated in the opinion below (676) reflects precisely the scope of Piedmont's application for a certificate authorizing the transportation of passengers, mail and property (App. 69-70). The scope of Piedmont's application is properly shown on Appendix B annexed to the Board's petition in solid red lines.[2] A comparison of the transportation applied for with the transportation certificated, consisting of the solid black lines both on the court's maps (676) and the Board's map, Appendix

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as "Piedmont"; respondent, State Airlines, Inc., is hereinafter referred to as "State". The citation "App." followed by number is to page numbers of the printed appendix filed in the court below and made a part of the printed record here. Plain numerical citations, without other explanation, refer to the supplemental printed record of proceedings in the court below filed here with the petitions for writs of certiorari. The citations preceded by "p." refer to pages of the respective petitions for writs of certiorari and Piedmont's brief in support of its petition.

[1]The decision below has now been reported in the Advance Sheets, *State Airlines* v. *Civil Aeronautics Board*, 174 F. 2d 510.

[2]The broken red lines on the Board's map have nothing to do with the present case for they concern Piedmont's application for a certificate to transport property and mail by the pickup method—a method wholly unsuitable for passenger transportation, which is the type of transportation certificated and here involved (see pp. 9-10, *infra*).

B, shows emphatically that the one bears no resemblance to the other.[1] There is no question here of whether the Board is entitled to award a certificate for substantially the transportation applied for, or whether it is entitled to certify transportation differing only in a small "segment" from the transportation applied for. The question is whether the Board can certificate transportation entirely different from that covered by the application.

The implication left by the Board's statement that the route certificated "was in some respects a consolidation" of the routes applied for by State and Piedmont (p. 8) is entirely unwarranted. The route certificated to Piedmont was that applied for by State and not covered by Piedmont's application at all. As the court below pointed out after discussing the Piedmont application (680):

> "It will also be noted from examination of Map No. 1 that Piedmont's broken-line (proposed) routes coincide exactly with the Board's (awarded) routes in only two places and there, in each case, for only very short

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[1]The map, which is Appendix B to the Board's petition, serves no purpose not equally well served by the maps annexed to the court's opinion (676). The solid blue lines are identical with the dotted red lines on the court's map No. 2. The solid black lines of Appendix B are identical with the solid black lines of the court's maps (except for slight deviations resulting from the larger scale). The solid red lines are identical with the dotted green lines on the court's map No. 1. The confusion engendered by the other lines hardly leads to an understanding of this case. Not only are the broken red lines wholly immaterial, but the broken blue lines showing routes abandoned by State, and the other lines showing "composite routes", have no relevance whatever here. The composite routes are particularly unfair in that they leave the inference that there were applicants other than State for the certificated routes here involved. That is not the case. If the composite applications were broken down so that each application were shown separately, it would be quite apparent that only State applied for the route pattern which the Board found was required by public convenience and necessity.

distances and only between two adjacent points on a branch route. Of the total of 39 points which Piedmont proposed to serve, only 9 lie along routes awarded by the Board. We think it completely obvious that Piedmont did not, in fact, specifically apply for the routes it was awarded by the Board."

As for the Board's present contention that the modification clause found in the Piedmont application is sufficient to change the scope of that application entirely, it seems unnecessary to add to the discussion by the court below (680-1; see also pp. 15-7, *infra*).

It is plain that Piedmont was not an applicant for the transportation certificated by the Board, and the Board's petition based upon the contrary premise is untenable.

(2) The Board misconceives the extent of the powers delegated to it by Congress.

The Board's basic reason for seeking a review here is that the decision of the court below will "confine the Board within * * * a procedural strait-jacket" (p. 13). The argument is that the Board should be entitled to decide whether service is required quite apart from any applications for transportation and should then be permitted to certify such transportation to any party whether an applicant for transportation or otherwise. Perhaps Congress could have delegated to the Board such broad powers. But Congress did not see fit to do so. It did not confer upon the Board the right to issue certificates of public convenience and necessity irrespective of applications. The right to issue certificates was carefully limited by Section 401 (d) (1) and (2) of the Civil Aeronautics Act (p. 12, *infra*). The Board was given the power and duty to "issue a certificate

authorizing the whole or any part of the transportation *covered by the application.*[1] There, the power of the Board ended (see pp. 12-4, *infra*).

If this power is too narrow, as the Board now contends (pp. 12-13), relief may be sought in Congress but hardly in the courts. Where the limitations and standards imposed by Congress are plain, the administrative agency must stay within such limitations and follow such standards. As this Court pointed out in *U. S.* v. *Carolina Carriers Corp.*, 315 U. S. 475, 489:

> "Neither the Court nor the Commission is warranted in departing from those standards because of any doubts which may exist as to the wisdom of following the course which Congress has chosen."

This decision controls here.

Furthermore, it should be noted that while Congress limited the original issuance of a certificate of public convenience and necessity to the whole or any part of the transportation covered by the application, it conferred upon the Board certain additional powers "after notice and hearing" to "alter, amend, modify or suspend any such [existing] certificate, in whole or in part" upon certain specified conditions.[2] It is significant that no such power was given to the Board with respect to the application for new certificates.

The published decisions of the Board show that heretofore the Board has been able to perform its duties within the framework of the Civil Aeronautics Act as construed in this case by the court below. Until the singular decision here made, the Board limited the issuance of new certificates to the "whole or

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[1]All emphasis supplied unless otherwise indicated.

[2]Civil Aeronautics Act of 1938, Section 401(h), 52 Stat. 987, 49 U. S. C., Sec. 481(h).

any part of the transportation covered by the application." (See, for example, cases cited at page 16, *infra*). This nation is honey-combed with a pattern of airlines, both trunklines and local lines, certificated pursuant to the Congressional formula. As a practical matter it thus seems plain that judicial extension of the limited power to certificate conferred by Congress is wholly unnecessary to achieve the results intended by the legislation. The decision below, therefore, raises no substantial question of statutory construction for review here.

(3) The Board misconceives the scope of the decision below.

The Board devotes three of its four specific assignments of errors (pp. 10-11) and the bulk of its argument dealing with "reasons for granting the writ" (pp. 11-17) to the statement made by the court below that finding Piedmont fit, willing and able to perform the transportation certificated was a finding "which is not only unjustified on the basis of the record, but unjustifiable" (683). This statement and the discussion in connection therewith did not constitute an independent ground for reversal but merely furnished additional support for the court's legal conclusion that the Board might not, under the Act of Congress here in question, certify transportation to one who was not an applicant therefor. The court specifically limited its decision to two questions stating (679):

> "The contentions of the parties to this review, as set forth in their briefs and in oral argument before us, make it clear that our decision depends upon the answers which must be given the following two questions: (1) was Piedmont, at the time of the Board's decision, an applicant for the routes it was ultimately awarded; and (2) if not, can the Board award a certificate to one

> who was not an applicant for the routes authorized by that certificate?"

The incidental discussion as to the lack of any support for the Board's finding that Piedmont was fit, willing and able occurred in the consideration of the second question and was immediately followed by the conclusion (686):

> "From the foregoing it is apparent that we answer both of the questions posed as the major issues in the case in the negative."

As the decision of the court below seems unassailable on the two basic issues decided by it, it makes little difference whether the court below was correct or incorrect in its incidental suggestion that there was no evidence to support the finding as to Piedmont's fitness, willingness and ability. But the court below was also correct on this score (pp. 21-4, *infra*).

In any event, review will usually not be granted upon the assertion by petitioner that the specific facts of the case require an answer different from the one given in the court below. *Houston Oil Co.* v. *Goodrich*, 245 U. S. 440, 441; *Southern Power Co.* v. *Pub. Serv. Co.*, 263 U. S. 508, 509; *Robertson and Kirkham*, Jurisdiction of the Supreme Court of the U. S. p. 534.

NO REASON FOR REVIEW IS PRESENTED

With the basic misconceptions upon which the petition for review is based eliminated, no reason for granting a review here remains. The portion of the Civil Aeronautics Act applied by the court below is plain on its face. The court below did no more than follow the statute when it held that one who did

not apply for transportation found by the Board to be necessary, was not entitled to a certificate. The court below specifically pointed out that it was not placing any literal or narrow construction upon the statute. Thus, the court said (681):

> "We here rule, on the facts presented and uncontroverted, that no reasonable mind could conclude that the routes awarded in this case to Piedmont were merely a modification of the routes proposed by it. The implied finding by the Board that Piedmont was an applicant for the routes awarded lacks the support of any evidence, substantial or otherwise. In ruling thus, *we have not said, and we do not wish to be understood as ruling, that the Board may not take advantage of a 'catch-all clause'* in an application by granting routes which represent slight deviations from those proposed."

The specific examples then cited by the court show plainly what the court meant and, contrary to the Board's suggestion (pp. 18-9), leave no ambiguity to be corrected by review.

II.

OPPOSITION TO PIEDMONT'S PETITION

Both the petition for writ of *certiorari* and its accompanying brief are concerned largely with Piedmont's claimed grievances relating to the decision of the court below and deal only slightly with reasons for review by this Court. It is, accordingly, difficult to attack the petition without a detailed consideration of the merits of the case. At this stage such a consideration would seem to be an imposition upon the Court. There are, however, certain fundamental inaccuracies in the presentation made by Piedmont which it may be desirable to clear up at this time.

(1) The charts embodied in Piedmont's petition are erroneous and its application is much more limited in scope.

In endeavoring to sustain the argument that Piedmont was in fact an applicant for the transportation erroneously awarded to it, Piedmont sets out two charts opposite page 2 of its petition.

Neither on the face of the chart nor in the text is it stated that the routes applied for, as shown on Chart 1, were expressly abandoned by Piedmont in its application filed March 8, 1945 (App. 63-70). Indeed, Piedmont, in its brief (see *e.g.* pp. 15, 24), seeks to leave the impression that it went before the Board on the basis of the application portrayed by Chart 1—a proposition concededly contrary to the actual fact. The abandonment of the application for transportation embodied in Chart 1 is beyond dispute (App. 63-70).

With respect to Chart 2, Piedmont neither on the face of the chart nor in the text advises this Court that the dotted lines upon that chart involve an application for authority solely to transport "mail, express and property using the pick-up method" (App. 64). The pick-up service applied for was a service of points without stops whereby mail and possibly property was to be picked up from a ground installation by a device on the plane while in flight (*All American Aviation, Pick-up, Delivery Service*, 2 C. A. B. 133, 137, f.n. 3). This service needs no airports except the *termini* and is obviously unsuited for passengers and conventional transportation of property.[1]

Piedmont's italicized argument (p. 4) that its amended application sought "authority to carry *passengers*" over "*all* the routes described in the application," is entirely unsupported by the record. Not only is the application with respect to the

[1]Indeed, the Civil Aeronautics Board has held that the combination of pick-up and passenger service is unsafe and will not be authorized (*All American Aviation, Combination Service*, 8 C. A. B. 241, 242).

routes covered by the dotted lines on Chart 2 expressly limited by the language (App. 64) just quoted above, but it is fantastic to suggest that passengers were to be snatched from ground installations and hoisted into planes while dangling from the end of pick-up lines or that they were to be returned to the ground in a similar manner.

The application for pick-up service was entirely denied by the Civil Aeronautics Board (App. 565 [902]) and Piedmont did not appeal from this decision.

The only Piedmont application here involved is its application to carry passengers, mail and property in the conventional manner by stops at airports and this application is shown by the solid lines on Chart 2 of Piedmont's petition for writ of *certiorari*. Contrary to the statement in Piedmont's petition (p. 3, f.n. 1), Map No. 1 printed by the Court of Appeals in its opinion (676) contains exactly and precisely the solid lines shown on Chart 2 in Piedmont's petition.[1]

With this exposition of the actual facts, most of Piedmont's arguments are dispelled. It is perfectly plain, as the court below pointed out, that Piedmont's application for routes east of the

[1]The court below, in explaining the use of its maps, specifically pointed out that its Map No. 1 shows all of the routes over which Piedmont sought authority to transport passengers, mail and property pursuant to the only application upon which it went before the Board (679, f.n. 5). Piedmont's argument (p. 15) that the court below "assumed to modify the actual scope of the application by eliminating all points described therein except those for which Piedmont applied in the sense that it 'actively, by brief and by oral argument before the Board, sought,'" is an entirely improper characterization of the court's opinion. The court did limit the routes applied for by State, as explained, but the court's footnote attached to the very paragraph from which Piedmont purports to quote, indicates that, as far as Piedmont is concerned, its entire passenger application was incorporated in the court's Map No. 1. This is the fact and Piedmont's argument to the contrary finds no support in the record.

Appalachian Mountains, principally in a north and south direction, from Columbia, S. C., to Washington, D. C., and Norfolk, Va., bears no relation whatever to the routes found by the Civil Aeronautics Board to be required by public convenience and necessity in the case for which review is here sought. The latter routes ran almost entirely in an easterly and westerly direction and were stated by the Board to be required for the purpose of connecting southeastern cities such as Wilmington, Charlotte and Norfolk, with important centers west of the Appalachian Mountains, namely, Louisville, Cincinnati and Lexington[1] (App. 565 [867, 892-5]).

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[1]A few extracts from the Board's opinion on this score are significant (App. 565 [892]):

> "Our study of the record leads us to the conclusion that local service connecting cities in the Piedmont area with Louisville and Cincinnati is justified. There is also a need for a route between Cincinnati and Norfolk via various intermediate points, and a route from Roanoke to Danville, Greensboro, Raleigh, Fayetteville, and Wilmington.
>
> * * * * *
>
> "* * * Transappalachian railroad and highway crossings to the Piedmont and Coastal Plain areas from the west are particularly circuitous and inadequate and in order to cross the mountains it is necessary to travel on trunk-line routes via certain Virginia cities and Washington to the north and thence westward or via Atlanta to the south and thence to the west. Moreover, the existing transportation pattern leaves the region east of the mountains isolated from the west and important points within this region without adequate connections among themselves."

There is much more to the same effect (App. 565 [867, 892-5]). These findings were substantially a paraphrase of State's evidence (App. 99-100, 104; 115, 120; 122-8; 213-19).

(2) Whether or not Piedmont's application covered the transportation authorized, as required by the Civil Aeronautics Act, was a judicial question which the court below was plainly empowered to decide.

The statute under which the Civil Aeronautics Board proceeded in the present case is Section 401 of the Civil Aeronautics Act (52 Stat. 987, 49 U. S. C. §481). This section prohibits an air carrier from engaging in air transportation without a certificate from the Board. The section requires applications for certificates to be in writing, to contain such information as the Board, by regulation, may require and to be accompanied by proof of service upon interested persons. There are further provisions for giving public notice and specific notice to such other persons as the Board may direct. There is provision for opposition to applications. Subsections (d)(1) and (d)(2) of Section 401 provide:

> "(d) (1) The Board shall issue a certificate authorizing *the whole or any part of the transportation covered by the application*, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; *otherwise such application shall be denied*.
>
> "(2) In the case of an application for a certificate to engage in temporary air transportation, the Board may issue a certificate *authorizing the whole or any part thereof* for such limited periods as may be required by the public convenience and necessity, if it finds that

> the applicant is fit, willing and able properly to perform such transportation and to conform to the provisions of this chapter and the rules, regulations, and requirements of the Board hereunder."

The regulations of the Board made pursuant to this statute (Amendment No. 3 of the Section 238.1 of the Economic Regulations, effective August 25, 1943, Fed. Reg. Vol. 8, No. 177, p. 12257-8) (1) provide for the execution of applications with due formality, including verification, (2) require the identification of each route for which a certificate is sought, specifying the type of service to be rendered and *naming "every terminal and intermediate point to be included in the certificate* for which application is made", and (3) require the inclusion of a map showing the routes applied for.[1]

Pursuant to this statute and these regulations, Piedmont filed its amended application on March 8, 1945 (App. 62-71) specifying the precise terminal and intermediate points with respect to which it sought a certificate for passenger, mail and property transportation (App. 69-70). This application was written in plain English and specified only the points appearing on Map No. 1, incorporated in the opinion of the court below

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[1]Piedmont's suggestion (p. 6) that the Civil Aeronautics Act does not require the application for certificate to specify "cities to be served or routes to be followed" is therefore without basis for the Act requires the application to "be in such form and contain such information * * * as the Board shall by regulation require" (Civil Aeronautics Act § 401[b], 52 Stat. 987, 49 U.S.C. § 481[b]). The wording of the Act likewise disposes of Piedmont's argument (p. 13) that the Board may, as a matter of discretion, decide in each case what the application is to contain and thus might properly decide in the present case that the Piedmont application, which did not specify at all the transportation certified, was in fact in compliance with the statute. The statute does not provide, as Piedmont urges, that the application shall be in such form and contain such information "as the Board shall require" (*i.e.* in each case), but specifies that the form and contents of the application are to be such "as the Board shall *by regulation* require".

(676); that is the basically northerly and southerly transportation east of the Appalachian Mountains.

On the basis of this application and the plain language of the statute which authorizes the Board only to "issue a certificate authorizing the whole or any part of the transportation *covered by the application*", the court below had no alternative but to decide that the certificate of public convenience and necessity had, as a matter of law, been issued erroneously to Piedmont.

There is no factual issue in this case as to the scope or extent of Piedmont's application.[1] It is set out in writing in this record. Its shortcomings to support the certificate issued, when measured against the statutory language, are so obvious that review here might well be denied, if for no other reason, on the ground that no question of any substance is presented. It is impossible to contend here that a certificate of public convenience and necessity covering service from Wilmington and

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[1]While Piedmont often states in its petition and brief (pp. 4, 5, 9; 12-3, 15-9) that the Board found as a fact that Piedmont was an applicant for the transportation applied for, there is no such finding of fact in the record. Indeed it is significant that while the Board in discussing other applicants called attention to routes requested, it pointedly refrained from doing so in the case of Piedmont (App. 565 [898-902]). The question of whether Piedmont was an applicant for the transportation certificated did not concern the Board at all when it made its original decision (at most Piedmont could contend that by the mere award of the certificate to it the Board assumed that Piedmont was an applicant), and, upon the reargument, the Board purported to decide the question purely as a matter of law. Thus, the order permitting reargument specifically limited that reargument to two questions (App. 591):

> "(a) whether the public interest requires the selection of State or Piedmont and (b) whether the Board committed legal error by awarding the route to Piedmont; * * *"

The Board's only decision as to the sufficiency of Piedmont's application to support the certification was in connection with resolving the second question, namely, whether any legal error had been committed (App. 614-7).

New Bern, N. C., and Norfolk, Va., to Cincinnati, O., and Louisville, Ky., is "the whole or any part of the transportation covered by the application" of Piedmont for service from Columbia, S. C., to Washington, D. C., and Norfolk, Va., or its additional route from Knoxville to Wilmington.

Indeed, no party seriously contended in the court below that the Piedmont application, in so far as it complied with the regulations in specifying all terminal and intermediate points, encompassed the transportation authorized. The principal contention had been that the introductory clause in the application should so broaden its scope that the Board could overlook the specification of routes and points entirely. The clause in question (App. 31) reads:

> "The Applicant * * * hereby applies for a * * * Certificate of Public Convenience and Necessity * * * for the authorization to engage in scheduled air transportation * * * *on the routes detailed herein*, or such modification of *such* routes as the Board may find public convenience and necessity require."

Whether this very limited clause[1] was sufficient in view of the language of the Civil Aeronautics Act and the Board regulations to transform Piedmont's application for north-south transportation into an application for east-west transportation between terminal points not covered by the Piedmont application at all, likewise, it is submitted, represented a judicial ques-

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[1]Petitioners now seek some comfort in the conclusion of the application which contains a general prayer for relief, including the stock phrase "for such other and further relief * * * as the Board may deem appropriate" (App. 41). This clause has never been held to be a substitute for required allegations in the application. It is wholly irrelevant to the issue here presented.

tion[1] which the court below very properly decided against Piedmont. Here, again, no factual issue is involved. The language of the application is plain. The court below was entitled to measure that language against the statutory requirements.[2] Indeed, Piedmont's argument that the construc-

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[1]Piedmont's statement (p. 7) that the court below treated the question of whether Piedmont was an applicant for the routes awarded as a "'fundamental question of fact'" is a misconstruction of the court's opinion. The court treated the fundamental question as one of law but, adverting to the argument advanced by Piedmont, said (681):

> "To be sure, the decision of what is or is not *a modification of a given set of proposed routes* is one which resolves itself in a fundamental question of fact and we recognize that it is not the function of this court to find fact or to substitute its judgment for that of the administrative tribunal on pure questions of fact concerning which opinions may reasonably differ. *However, that is not this situation.* We here rule, on the facts presented and uncontroverted, that no reasonable mind could conclude that the routes awarded in this case to Piedmont were merely a modification of the routes proposed by it. The implied finding by the Board that Piedmont was an applicant for the routes awarded lacks the support of any evidence, substantial or otherwise."

This is certainly a correct application of the law which requires no review here.

[2]Piedmont's suggestion (pp. 16-18) that the Civil Aeronautics Board had in the past treated clauses such as the modification clause in the Piedmont application as sufficient to justify certication of transportation not applied for at all, is entirely contrary to the Board's own precedents. Prior to the decision in the present case, the Board has repeatedly adhered to the proposition that requirements of fair hearing preclude the award to an applicant of routes not covered by his application no matter how broad a catch-all clause may have appeared in the application (the catch-all clauses in question were usually much broader than the "modification" clause here involved). See *e.g.*, *Trans-Southern Air., et al., Amarillo-Oklahoma City Op.*, 2 C. A. B. 250, 268-9; *Colonial Air et al., Atlantic Seaboard Op.*, 4 C. A. B. 552, 559; *North Central Case*, 7 C. A. B. 639, 674; *West Coast Case*, 6 C. A. B. 961, 997; *Panagra Terminal Investigation*, 4 C. A. B. 670, 673; *Texas-Oklahoma Case*, 7 C. A. B. 481, 520, see also 39 Op. Atty. Gen. 442, 444.

The *North Atlantic Routes Case*, 6 C. A. B. 319, cited by Piedmont (p. 17), is not in point for it involved foreign routes with respect to

tion of its application in the light of the statute was a matter solely in the discretion of the Board and not subject to judicial review, is a most flagrant extension of the type of argument specifically rejected, for example, in *Roberts v. United States*, 176 U. S. 221, 231, and *Wilbur* v. *Krushnic*, 280 U. S. 306, 318-9; see also *United States* v. *N. Y. Central R. R.*, 263 U. S. 603; vom Baur, *Federal Administrative Law* (1942), vol. 1 p. 437-8. It is certainly not in keeping with the provisions of Section 10 of the Administrative Procedure Act of 1946 relating to judicial review (60 Stat. 243, 5 U. S. C. § 1009 [e]).

(3) The repeated suggestion that there is anything in the decision below contrary to Chicago, St. P., M. & O. Ry. Co. v. U. S., 322 U. S. 1 (Piedmont's pet. pp. 7, 10; br. pp. 13, 21) is wholly unfounded.

Reference is apparently made to that portion of the *Omaha Railway* case in which it was decided that the Interstate Commerce Commision had the power to order an applicant (in a "grandfather" clause case) to serve certain *intermediate* points (which had previously been served by applicant) upon routes which had been specifically applied for but which points applicant, by amendment to its application, had indicated it did not wish to serve. Even if it be assumed that the Civil Aeronau-

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which the statute specifically permits the Board to issue certificates without designating terminal or intermediate points but designating "only the general route or routes to be followed". Neither in *Rocky Mountain States Case*, 6 C. A. B. 695, nor in the *North Central Case*, 7 C. A. B. 639, did the Board give any indication that it was issuing certificates on the basis of modification clauses rather than on the basis of points applied for. Certainly, the language of the Board in the *North Central Case* above cited is exactly contrary to Piedmont's contention.

tics Board has the same power,[1] and the court below made this assumption (681), no such question is here presented. This is not a situation in which additional intermediate points were added to a certificate or even a situation in which other points in the general vicinity of the routes applied for were added. In this case, in direct violation of the Civil Aeronautics Act above quoted, the Board awarded to Piedmont a certificate for transportation not covered by its application at all; awarded to it a pattern of routes not covered by its application at all and changed the entire character of the operation covered by Piedmont's application. This, we may add, was done contrary to the recommendation of the Board's trial examiners and contrary to the recommendation of its own public counsel (Recommendations for State: App. 514-6, 521-2; 535-7, 549, 550; Recommendations for Piedmont: App. 518-9, 520, 549). What happened in the Civil Aeronautics Board is very plain from this record. The Board found that public convenience and necessity did not require the north-south transportation from Columbia, S. C., to Washington, D. C., and Norfolk, Va., applied for by Piedmont and then for some wholly capricious reason, without notice to anyone, awarded to Piedmont the precise routes for which State had applied and with respect to which State introduced all of the evidence—routes in which Piedmont had not, prior to the decision by the Board, evinced the slightest interest.

Piedmont's argument, based on the contention that it "was earnestly and vigorously requesting the Board to issue to it a certificate in the identical form in which it was finally issued"

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[1] It should be noted that the statutory provision (Section 208 [a] of the Interstate Commerce Act, 49 U.S.C. 308[a]), upon which the Court relied in the *Omaha Railway* case (322 U.S. at p. 4), included a phrase omitted from a somewhat similar provision in the Civil Aeronautics Act (§401[f]), viz., the right to attach to a certificate terms "including terms, conditions and limitations as to the *extension* of the route or routes of the carrier".

(p. 15), is unsupported by a single record citation and is unsupportable. It was not until after the original decision of the Board presented to Piedmont a wholly unexpected windfall that Piedmont made any request for the issuance of a certificate covering the transportation here certified. Thereafter, to be sure, it has sought, with dogged cupidity, to hold that which originally it never sought to have.

Piedmont's suggestion (p. 7, 14, 20) that the extraordinary award made by the Civil Aeronautics Board should not have been reversed by the court below because Section 401(f) of the Civil Aeronautics Act permits the Board to attach "to the exercise of the privileges granted by the certificate, * * * such reasonable terms, conditions, and limitations as the public interest may require", stretches the language just-quoted beyond all reasonable bounds. It is impossible to argue that Congress, by permitting the Board to attach reasonable terms, conditions and limitations to the exercise of the privilege certified, intended in any way to alter or amend the basic provision of the law which limited the Board's right and duty to issue any certificate whatever to "the whole or any part of the transportation covered by the application" (§ 401[d] of the Act).

If Piedmont's construction is to be adopted, not only is the express limitation set upon the Board's power to be disregarded but the provisions for notice (Civil Aeronautics Act, § 401[b]) become a travesty. If an application for northerly and southerly routes principally between Washington, D. C., and Columbia, S. C., gives notice to other applicants and public counsel of ambitions to operate between Norfolk and Cincinnati, or Wilmington and Louisville, then the provisions for notice are wholly meaningless. If such is to be the construction of the Civil Aeronautics Act and the procedure thereunder, then what becomes of the requirement that the right to an adminis-

trative hearing "embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them" (*Morgan* v. *United States*, 304 U. S. 1, 18)? And what becomes of the requirement, as the Administrative Procedure Act of 1946 puts it, that interested parties "be timely informed of * * * the matters of fact and law asserted" (Administrative Procedure Act, § 5, 60 Stat. 239, 5 U. S. C. § 1004)?

(4) The suggestion that there should be a modification of the order of the court below permitting Piedmont to retain routes east of the Appalachian Mountains, calls for a reversal of the Board's factual determination as to which routes were required by public convenience and necessity.

Piedmont's suggestion (p. 9, 26-8) that it should be allowed to operate a part of its routes, seeks a judicial reversal of the Board's finding that the transportation required by public convenience and necessity had to connect points west of the Appalachian Mountains, that is, Louisville and Cincinnati with points east thereof, such as Wilmington, Norfolk, New Bern and intermediate points (App. 565 [892-6]). There is no finding in this record that public convenience and necessity requires local service exclusively east of the Appalachian Mountains. The finding is to the contrary (App. 565 [982-6]). Indeed, the rejection by the Board of Piedmont's application for such service demonstrates that public convenience and necessity does not require it. This Court surely will not substitute its own judgment for that of the Board upon a question so peculiarly within the Board's province. If, as the court below held, Piedmont is not entitled to a certificate for service connecting points west of the Appalachian Mountains with those east thereof, it is plainly not entitled to any certificate at all on the present record. No modification of the judgment below is possible.

(5) The court below was also correct in holding that the certification of Piedmont was arbitrary and capricious in that there was no evidence to support Piedmont's fitness, willingness and ability to operate the routes in question.

As the court below was so clearly correct in its decision that Piedmont was not within the statute an applicant for the transportation certificated to it, it seems hardly necessary to consider the purely incidental (though equally correct) conclusion that the Board action was arbitrary and capricious because there was no evidence of Piedmont's fitness, willingness and ability to conduct the transportation in question.

The Board itself has laid down the general standards whereby it judges whether an applicant is "fit, willing, and able" to perform the transportation in question as required by the statute (Civil Aeronautics Act, § 401 [d]). The applicant must have "(1) a proper organizational basis for the conduct of air transportation; (2) a plan for the conduct of the service made by competent personnel; (3) adequate financial resources".[1] In addition, the Board has laid down rules to guide it particularly in cases such as the present one involving local service. In *Investigation of Local, Feeder, and Pick-up Air Service*, 6 C.A.B. 1, the following requirements were set out (p. 4):

> "With respect to showing a justifiable expectation of success at a reasonable cost to the Government, it will be incumbent upon *each applicant to meet the test* of public convenience and necessity *by showing* a need for the service, the probable use that will be made of it, the effect on existing air services, and a cost to the Government in mail compensation bearing a reasonable

[1] See *Braniff Airways v. Civil Aeronautics Board*, 79 U.S. App. D.C. 341, 342, 147 F. 2d 152, 153.

> relationship to these elements and to the character and quality of the service proposed."

There is no dispute that in the present case Piedmont did not offer one scintilla of evidence relating to the east-west transportation certified. It presented no plan whatever "for the conduct of the service" covered by the certification. As to such service, it presented no schedules, no plan for the utilization of airports, no weather data, no time saving data, no plans for the use of radio guides, no data as to the traffic potential of the service, as to its effect upon existing airlines, and as to the cost to the Government in mail compensation of the service to be rendered.[1] On the contrary, Piedmont's evidence relating to operation with a single engine plane (which had never received an air-worthiness certificate for commercial passenger transportation) (Piedmont's Exh. 50, App. 368; 460), and its plans for day contact flight (App. 368), without radio instrument operation precluded operation, over the routes certificated (684). In the court below, Piedmont conceded that the Board in its finding as to Piedmont's fitness, willingness and ability had not applied its usual standards (Piedmont's Brief below, p. 22):

> "In some previous decisions the Board applied three tests in determining an applicant's fitness, willingness, and ability. These were: (1) a proper organizational basis; (2) a plan for the conduct of service made by competent personnel; and (3) adequate financial resources. [citation] These tests were *not* specifically applied by the Board in determining Piedmont's fitness, willingness, and ability."

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[1]With respect to the transportation certificated, the only evidence relating to any of these points was furnished by State (State's Exhs. 3-66, App. 72-204).

The court below, on the record, came to the only possible conclusion when it said (684):

> "In the instant case, we have presented the still stronger situation wherein, even at the time of the Board's finding that Piedmont was fit, willing, and able, there was *no* evidence of Piedmont's appropriate qualification for the awarded routes. We find the record before us barren of any evidence put in by Piedmont to show its fitness, willingness, or ability to operate west of the Appalachians or over mountainous terrain. In fact, Piedmont's evidence was to the contrary" (Italics in the original opinion though not in the reprint furnished by the Board to this Court).

Piedmont's suggestion that this is an unfounded conclusion because the Board, with its specialized wisdom, might overlook the lack of all relevant data, and base its decision upon a plan of sorts presented by Piedmont to operate single-engined planes without radio communication between Columbia, S. C., and Washington, D. C., as well as the few other points involved in its basically northerly and southerly scheme of operation, is fantastic on its face. The question is not whether Piedmont had some plan for operation but whether it had "a plan for the conduct of *the* service"—obviously, the service to be certificated. For such service it offered no plan and had none. In its petition Piedmont points to no evidence which could support a finding that it had shown itself fit, willing and able, in the light of the criteria established by the Board, to operate the transportation certificated to it.

Piedmont's further contention that the question of its fitness, willingness and ability was not subject to court review because there was no challenge thereof before the Board (p. 23), is likewise unsupportable by the record. Immediately upon the

Board's announcement of its surprising decision[1] awarding to Piedmont that for which State had applied, State filed a petition for reargument in which it plainly asserted (App. 566 [38]):

> "Consequently, it is impossible to consider Piedmont fit, willing and able for the routes awarded to it."

Amplifying the petition upon oral argument, counsel for State said (App. 602):

> "Turning now to the next important element in fitness, willingness, and ability, namely, 'a plan for the conduct of the service made by competent personnel'. It is on this phase of the case that we believe Piedmont completely falls down."

Much detailed argument followed (R. 16626-36) and counsel for State concluded (R. 16636):

> "On the other hand, Piedmont showed no plan for the operation of these routes, demonstrated no appreciation of scheduled air transportation matters * * * nor did it have financial and cost exhibits relating either to these routes or the character of operation which the Board intended."

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[1]Such a decision had not been expected by anyone for not only had Piedmont not applied for the routes in question but it had not even filed exceptions to the Examiners' Report to indicate that it was a candidate therefor (App. 533-4); it had not requested them in its brief (App. 538-48) and, indeed, at the hearings Piedmont had plainly indicated a lack of interest in anything other than the route covered by its application (App. 470). As the court below concluded (681):

> "Piedmont having taken this position before the Board, it is not difficult to believe that Piedmont was the most surprised applicant of all when the Board announced its decision awarding Piedmont routes which are certainly not 'along' Piedmont's 'proposed routes' and routes which certainly do 'materially upset' Piedmont's 'plan of operation.' "

CONCLUSION

Neither the Board nor Piedmont present to this Court any important questions for review. This is fundamentally a controversy between State and Piedmont relating to whether Piedmont should be entitled to have the advantages of State's application before the Board, should obtain the benefits of all of State's evidence, all of State's plans and all of State's expenditures and years of work in preparing the data upon which the Board issued the certificate to Piedmont. The court below has held as a matter of law that Piedmont is not entitled to the certificate which the Board issued upon the basis of the application and evidence of State. This involves no great public issue.

The decision below, while holding that the Board must act within the statute which limits its right to issue a certificate to the whole or any part of the transportation applied for, does not unduly restrict the Board. The decision specifically permits the Board all latitude which can possibly be inferred from the statutory language used. It permits the Board to certify to an applicant intermediate points along routes applied for and even adjacent points when reasonably connected with the application actually made (681).

Beyond that, and untouched by the decision in this case, is the conceded power of the Board, after a certificate has been issued, upon compliance with Section 401 (h) of the Civil Aeronautics Act (49 U. S. C. § 481 [h]), "after notice and hearing", to alter, amend, modify, or suspend any such certificate, in whole or in part upon the conditions stated in the statute. The exercise of this power upon adequate notice to all interested persons is ample to permit the Board to effectuate any powers of certification conferred upon it by Congress. It is very different from the power which the Board arrogated

unto itself in the present case where, without notice and without hearing *qua* the certification to Piedmont, it awarded to one who had not applied at all for the system of transportation certificated, the certificate of public convenience and necessity to which another applicant was plainly entitled. Indeed, the only question of any importance in this case, it is respectfully submitted, is the one raised in the cross-petition (No. 158) relating to the inadequacy of relief accorded to State by the court below.

The petitions for writs of *certiorari* in numbers 157 and 159 should be denied.

Respectfully submitted,

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